

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

FILED  
U.S. DISTRICT COURT  
DISTRICT OF NEBRASKA

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OFFICE OF THE CLERK

Randall S. Krause,

Plaintiff,

v.

City of Omaha,

Defendant.

Case No. 8:14cv94

**PLAINTIFF'S TRIAL BRIEF**

I. Introduction

Plaintiff seeks declaratory relief to resolve a controversy. Federal jurisdiction is asserted pursuant to 28 U.S.C. §§ 2201-2202 and 28 U.S.C. § 1331.

II. The Controversy

Plaintiff asserts that the sand, rock salt, calcium chloride, magnesium chloride, and beet extract ("the materials") that the Defendant applies to streets in the City of Omaha for snow and ice control during the winter season constitute "solid waste" under 42 U.S.C. § 6903(27) after they have served their intended purpose. The Defendant does not acknowledge that the materials become solid waste under the laws of the United States.

III. Legal Relations

If the materials constitute solid waste after they have served their intended purpose, then the Defendant is a generator of solid waste under the Resource Conservation and Recovery Act<sup>1</sup> ("RCRA") and must ensure that the materials are disposed of in an environmentally sound manner according to guidelines in a Solid Waste Management Plan developed with public participation. See 42 U.S.C. § 6942(b-c), 42 U.S.C. § 6943(a)(2), 42 U.S.C. § 6944(b), 42 U.S.C. § 6947(a) and 42 U.S.C. § 6974(b). Guidelines currently exist pursuant to 40 CFR § 256 for the materials that the Defendant picks up with street sweepers and disposes of in a licensed landfill. This lawsuit aims at extending guidelines to the materials that are disposed of outside of a licensed landfill by runoff.

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<sup>1</sup> 42 U.S.C. §§ 6901-6992k.

#### IV. Adverse Interests

The Plaintiff's interest is protecting the environment. See 42 U.S.C. § 6901(b)(2). The Defendant's interest is protecting the status quo.

#### V. Solid Waste

In RCRA the term "solid waste" means

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 et seq.].

42 U.S.C. § 6903(27).

#### VI. Argument

Unless they are excluded by the statute, materials that have been "disposed of" constitute "solid waste" within the meaning of RCRA. American Mining Congress v. U.S. EPA, 824 F.2d 1177, 1193 (D.C. Cir. 1987). The materials at issue in this case are disposed of by runoff and street sweepers.

The Defendant applies the materials to streets to melt snow and ice and afford better traction. Uncontroverted Facts 6, 7 and 8, and Plaintiff's Exhibits 6, 7 and 8. By melting snow and ice, the materials produce a vehicle for their own disposal. With the exception of the sand, the materials are dissolved in runoff. 78 Fed. Reg. 48954-55 (Aug. 12, 2013). Runoff carries the materials away and deposits them wherever it goes. *Id.*, and see United States v. Plaza Health Laboratories, 3 F.3d 643, 652 (2d Cir. 1993, Oakes, J., dissenting).

The materials carried away by runoff are not recovered and recycled. For example, runoff that enters the Municipal Separate Storm Sewer System ("MS4") in Omaha is discharged into the Papillion Creek, the Missouri River, or one of their tributaries.<sup>2</sup> Plaintiff's Exhibit 2,

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<sup>2</sup> Discharges from municipal storm sewers are "municipal discharges" as opposed to "industrial discharges" that are excluded under RCRA. 33 U.S.C. § 1342(p)(3).

p. 4. The MS4 is a system of conveyances for stormwater runoff. 40 CFR § 122.26(b)(8). Municipal streets are a part of the MS4, along with catch basins, curbs, gutters, ditches, manmade channels, and storm drains. *Id.* By applying the materials on the MS4, the Defendant creates runoff that drains by design into local waterways, carrying the materials along with it.

The Defendant picks up some of the materials that remain on the pavement with street sweepers in the spring. Uncontroverted Fact 10 and Plaintiff's Exhibits 3 and 4. The Defendant's website states that "Every paved street with curbs in the City is swept. The sweepings primarily consist of sand, leaves, other tree debris and litter. The material is disposed of in a licensed landfill." Plaintiff's Exhibit 5. Given these facts, it is clear from the following two examples that the majority of the materials are disposed of by runoff.

Example 1: For the 2010-11 winter season, the Defendant purchased 76,200,000 pounds of rock salt and 20,000 tons of sand/gravel mix. Uncontroverted Fact 5d and Plaintiff's Exhibit 6. In 2011 the Defendant picked up 6,392 tons of debris with street sweepers. Plaintiff's Exhibit 1, p. 19, ¶ D.

Example 2: For the 2012-13 winter season, the Defendant purchased 63,100,000 pounds of rock salt and 10,000 tons of sand/gravel mix. Uncontroverted Fact 5f and Plaintiff's Exhibit 8. In 2013 the Defendant picked up 5,320 tons of debris with street sweepers. Plaintiff's Exhibit 2, p. 21, ¶ D.

Because the materials are not disposed of in the form of domestic sewage, irrigation return flows, industrial discharges, or nuclear waste, they are not excluded from being solid waste under RCRA. See 42 U.S.C. § 6903(27).

## VII. Conclusion and Relief

After they have served their intended purpose, the materials are disposed of by runoff and street sweepers. Materials that have been disposed of constitute "solid waste" under 42 U.S.C. § 6903(27). A declaration from the Court that places the Defendant under RCRA as a generator of solid waste will begin the process of developing guidelines to ensure that all of the materials are disposed of in an environmentally sound manner.



Dated: 1/10/2015

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Certificate of Service

I certify that on 1/10/2015, I mailed a copy of the Plaintiff's Trial Brief by United States Postal Service to Alan M. Thelen at 1819 Farnam St., Suite 804, Omaha, NE.

Randall S. Krause